

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

CEDRIC ROMONE GARDNER, #31182-177 §

VS.

§

CIVIL ACTION NO. 5:05cv201

CRIM. NO. 5:03-CR-27(01)

UNITED STATES OF AMERICA

§

CRIM. NO. 5:04-CR-3(01)

MEMORANDUM OPINION AND ORDER

Movant Cedric Romone Gardner, an inmate confined at F.C.I. Texarkana, filed the above-styled and numbered motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. The motion was referred to United States Magistrate Judge Caroline M. Craven. After conducting an evidentiary hearing as required by the Fifth Circuit, Magistrate Judge Craven issued a Report and Recommendation concluding that Gardner should be granted an out-of-time appeal. The Government has filed objections.

The Report of the Magistrate Judge, which contains her proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections raised by the Government to the Report, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and the objections of the Government are without merit.

In the objections, the Government stated that it “objects to the Magistrate’s reliance on United States v. Tapp, 491 F.3d 263 (5th Cir. 2007), and Roe v. Flores-Ortega, 528 U.S. 470 (2000), in recommending that Gardner’s 28 U.S.C. 2255 claim should be granted.” However, in remanding the case, the Fifth Circuit issued the following instructions to the Court:

Gardner has made a substantial showing of the denial of a constitutional right regarding the contention that counsel was ineffective for failing to file a notice of appeal. *See United*

States v. Tapp, 491 F.3d 263, 266 (5th Cir. 2007). Gardner alleges that he asked counsel to file a notice of appeal and that counsel did not file one. The record does not conclusively indicate that Gardner did not ask counsel to file a notice of appeal, making an evidentiary hearing on that issue necessary.

Even though the Government complained that Magistrate Judge Craven relied on *Tapp* in recommending that relief be granted, the Fifth Circuit's remand order dictated that this Court apply *Tapp* to the facts of this case. Magistrate Judge Craven properly adhered to the instructions of the Fifth Circuit. After conducting a *de novo* review of the evidence, the Court finds that the preponderance of the evidence does not indicate that Gardner did not ask counsel to file a notice of appeal. Moreover, as found by Magistrate Judge Craven, the preponderance of the evidence reveals that Gardner voiced his dissatisfaction with the sentence at the time of sentencing, that he expressed a desire to appeal at that time, and that counsel did not file a notice of appeal. Gardner is entitled to an out-of-time appeal in light of *Tapp*. Therefore the findings and conclusions of the Magistrate Judge are adopted as the findings and conclusions of the Court. It is accordingly

ORDERED that Gardner's § 2255 motion is **GRANTED** and he is granted an out-of-time appeal. Gardner has ten days from the entry of this Order to file a notice of appeal. All motions not previously ruled on are **DENIED**.

SIGNED this 7th day of March, 2008.

A handwritten signature in black ink, appearing to read "David Folsom", is written over a horizontal line.

DAVID FOLSOM
UNITED STATES DISTRICT JUDGE